IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-260

LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,

Appellant,

—against—

PATRICK J. CUNNINGHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION, AMICI CURIAE

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INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, nonpartisan organization engaged in the defense of those principles embodied in the Bill of Rights. The New York Civil Liberties Union is the New York State affiliate of the ACLU.

Prominent within the pantheon of constitutional principles are the associational freedoms implicit within the First Amendment and the freedom from self-incrimination as protected by the Fifth Amendment. The instant case presents an interplay between those two fundamental freedoms. Accordingly, the ACLU and NYCLU request the opportunity to discuss that interplay by submitting a brief amici curiae. At the invitation of the Court below, the NYCLU appeared in an amicus capacity. Counsel for both parties have consented to the filing of the instant brief by amici.

SUMMARY OF ARGUMENT

Section 22 of the New York Election Law, by disqualifying appellee from holding all party office, unconstitutionally intrudes into the internal affairs of a private political association. The provision thus violates the First Amendment's freedom of association in derogation of the rights of appellee as well as the rights of the members of the New York State Democratic Party.

Section 22 of the New York Election Law also unconstitutionally compels testimony that has not been immunized from subsequent criminal prosecution in a manner that offends the privilege against self-incrimination. An unconstitutional coercion of the freedom from self-incrimination exists not only because Section 22 imposes substantial economic penalties upon appellee but perhaps more profoundly because

it conditions the exercise of the privilege against self-incrimination upon the waiver of appellees associational freedoms. Moreover, the circumstances surrounding appellee's refusal to waive his privilege against self-incrimination can invite no adverse inference of wrongdoing whatever. Thus, the coercive scheme imposed by Section 22 of New York's Election Law must, therefore, be invalidated.

ARGUMENT

I. SECTION 22 OF NEW YORK'S ELECTION LAW IMPERMISSIBLY REQUIRES APPELLEE TO WAIVE ONE CONSTITUTIONALLY PROTECTED RIGHT IN ORDER TO INVOKE A SECOND, EQUALLY SIGNIFICANT, RIGHT.

This Court has systematically ruled that the imposition of a serious collateral sanction may not be utilized as a penalty for the failure to waive a constitutional right. Eg. Sherbert v. Verner, 374 U.S. 398 (1963); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Harman v. Forssenius, 380 U.S. 528 (1965); Doyle v. Ohio, ___ U.S. ___, 44 U.S.L.W. 4902 (1976). See generally, Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L.Rev. 1439 (1968). As the Court below noted, the collateral sanction of loss of position imposed upon appellee as the penalty for refusing to execute a blanket waiver, in advance, of his Fifth Amendment rights was violative of an unbroken line of cases applying the general rule aginst such collateral sanctions in the specific context of attempts to coerce the waiver of Fifth Amendment rights. Eg. Lefkowitz v. Turley, 414 U.S. 70 (1973). However, in view of the unique political sanction imposed by Section 22 of New York's Election Law 1/ appellee was not merely threatened with a collateral penalty of substantial (albeit non-constitutional) dimension because he refused to waive his Fifth Amendment rights, he was placed in the untenable position of being forced to endure

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1/ Section 22 applies solely to officials of political parties and, in effect, bars them from party office unless they waive their rights under the Fifth Amendment.

the loss of one constitutional right as the inevitable consequence of exercising a second, equally significant, constitutional right.

Since this Court's decision in Williams v. Rhodes, 393 U.S. 23 (1968), it has been clear that the right to join a political party and to participate in its internal affairs is protected against state encroachment by the First Amendment's guarantee of freedom of association. Accordingly, in participating vigorously in the internal affairs of the New York State Democratic Party and serving as its Chairman, appellee was engaged in classic First Amendment activity. Eg. Kusper v. Pontikes, 414 U.S. 51 (1973). Moreover, given his avowed status as a target of the grand jury before which he appeared, appellee was clearly within his Fifth Amendment rights in insisting upon remaining silent unless and until the measure of "use" immunity described in Gardner v. Broderick, 392 U.S. 273 (1968) and Lefkowitz v. Turley, 414 U.S. 70 (1973) was granted to him. 2/ Given the automatic effect of Section 22, therefore, the price of appellee's exercise of his First Amendment right to continued activity within the New York State Democratic Party was the surrender of his Fifth Amendment rights. Conversely, the price of appellee's exercise of his Fifth Amendment rights was the coerced surrender of his First Amendment activities. Whatever the law may be concerning the application of collateral penalties of a non-constitutional nature as the price of exercising a constitutional right, surely the price of one constitutional right cannot be the destruction or waiver of a second, equally significant, constitutional right. cf. Dunn v.

2/ This case, and the several which have preceded it from New York, raising similar issues, are the consequence of stubborn refusal of New York authorities to utilize the use immunity device described by Mr. Justice White in Lefkowitz v. Turley, supra.

Blumstein, 405 U.S. 330, 342 (1972) (state may not force a choice between the right to travel and the right to vote).

Accordingly, given this Court's consistent refusal to tolerate sub-constitutional collateral sanctions as a penalty for the failure to waive Fifth Amendment rights, this case, involving as it does a collateral sanction which impinges on First Amendment values, would appear to present the clearest example of unconstitutional behavior.

II. SECTION 22 OF NEW YORK'S ELECTION LAW UNCONSTITUTIONALLY ABRIDGES THE RIGHT OF MEMBERS OF POLITICAL PARTIES TO SELECT THEIR LEADERS FREE FROM STATE COMPULSION. 3/

Political parties stand in an anomalous position within our legal system. On the one hand, it is now clear that when political parties are engaged in the selection of nominees for public office, they perform a integral parts of a state's electoral process and are, thus, subject to wideranging constitutional scrutiny as well as regulation when necessary to advance a compelling state interest. Eg. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953); Rosario v. Rockefeller, 410 U.S. 752 (1973); Storer v. Brown, 415 U.S. 724 (1974); American Party of Texas v. White, 415 U.S. 767 (1974). On the other hand, it is equally clear that political parties, as private associations of individuals seeking common political objectives, are substantially insulated by the First Amendment from undue state intrusion into internal party affairs. Eg. Williams v. Rhodes, 393 U.S. 23 (1968); Kusper v. Pontikes, 414 U.S. 51 (1973); O'Brien v. Brown, 409 U.S. 1 (1972); Cousins

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3/ Appellee possesses standing to assert the associational rights of the Democratic Party itself as well as the rights of its members. Eg. Singleton v. Wulff ___ U.S. ___, 44 U.S.L.W. 5213 (1976); Eisenstadt v. Baird 405 U.S. 438 (1972); Procunier v. Martinez, 416 U.S. 396 (1974); See generally NAACP v. Alabama 357 U.S. 449 (1958).

v. Wigoda, 419 U.S. 477 (1975). Thus, when a state seeking to impose regulations upon a political party goes beyond regulation of the nominating process and attempts to interfere with internal party affairs, the associational rights of the party and its members are endangered. Cousins v. Wigoda, supra, at 487-788. In purporting to remove appellee from the elected Chairmanship of the New York State Democratic Party and in seeking to bar him from internal party office for five years, New York has strayed far beyond the permissible limits of regulation of the nominating process and has unduly intruded itself into the internal affairs of a private political association. 4/

4/ Appellants seek to justify New York's attempt to dictate the leadership of the Democratic Party by arguing that the Party Chairman engages in the selection of successor nominees o replace those initial nominees who resign or die prior to election. Moreover, argues appellant, a Party Chairman plays a significant role in determining whether non-members of the Party are to be permitted to seek the Party's nomination. However, despite appellee's sporadic and insignificant participation in the nomination process, the vast bulk of a Party Chairman's duties involve exlcusively internal concerns of the Party, such as the articulation of the Party's platform and the internal organization of its structure. At most, New York may seek to regulate appellee's role in the nominating process. Instead, Section 22 seeks to prevent appellee from carrying out his purely private functions as Party Chairman as well, thus rendering the statute unconstitutionally overbroad. Eg. Lewis v. City of New Orleans, 415 U.S. 130 (1974); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

In Cousins v. Wigoda, 419 U.S. 477 (1975), this Court confronted a similar clash between a state regulatory scheme and internal decisions of a political party. In Cousins, "regular" delegates to the 1972 Democratic National Convention, elected in accordance with valid Illinois law, sought to prevent an insurgent slate of delegates which had been recognized by the convention's Credentials Committee, from replacing them as the Illinois' delegation. The "regulars" argued that valid Illinois law governed the Illinois delegate selection process and that if Illinois law conflicted with the internal rules of the Democratic Party, Illinois law must prevail. The regulars obtained a state injunction against the insurgents, which was arguably violated by the insurgents when they were seated as the accredited Illinois delegation. In refusing to hold the insurgents in contempt, this Court ruled that the internal decisions of the Democratic Party were not subject to frustation by the Illinois election law. Similarly the internal decision of the membership of the New York State Democratic Party to elect appellee as Party Chairman is not subject to veto at the hands of a benevolent state. The decision as to who is best suited to lead the New York State Democratic Party is a private associational one which may not be pre-empted by Section 22 of New York's Election Law.

III. THE OPERATION OF SECTION 22 OF THE NEW YORK ELECTION LAW UNCONSTITUTIONALLY COERCES APPELLEE INTO WAIVING HIS PRIVILEGE AGAINST SELF-INCRIMINATION

The lesson of the Supreme Court decisions from Garrity v. New Jersey 385 U.S. 493 (1967) through Lefkowitz v. Turley, 414 U.S. 70 (1973) is clear. The state may not condition employment, 5/ licensure, 6/ government contracts 7/ or public office 8/ upon the waiver of the constitutional privilege against self-incrimination. This doctrinal line of authority rests upon two propostions. First, that there is a significantly coercive quality to the imposition of such conditions. Second, that persons acting in a public or even quasi-public capacity may be compelled to respond to questions about their performance of public duties but only if their answeres cannot be used against them in subsequent criminal prosecutions. Measured against these two propositions appellants' attempted enforcement of Section 22 of the New York Election Law violates the privilege against self-incrimination in precisely the same manner as the provisions that were at issue in Garrity v. New Jersey, supra, Spevak v. Klein, 385 U.S. 511 (1967), Gardner v. Broderick 392 U.S. 273 (1968), and Lefkowitz v. Turley, supra.

5/ Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men v. Commissioner, 392 U.S. 280 (1968).

6/ Spevack v. Klein, 385 U.S. 511 (1967).

7/ Lefkowitz v. Turley, 414 U.S. 70 (1973).

8/ Garrity v. New Jersey, supra.

Following is a discussion of these two propositions within the context of the case at bar.

A. The Coercive Impact of Section 22 of the New York Election Law

Under the terms of Section 22 of the New York Election Law, a party officer who is compelled to appear before a Grand Jury and testify regarding the performance of official duties must answer all relevant questions and waive immunity from subsequent prosecution. A party officer who refuses to sign a waiver of immunity is, pursuant to Section 22, to be removed from party office and disqualified from holding any party or public office for a period of five years. Thus, in the case at bar, appellee was called before a Grand Jury and asked questions regarding the performance of his responsibilities as chairman of both the Bronx County Democratic Executive Committee and the New York State Democratic Committee. In this regard, he was asked to execute a waiver of immunity and warned that a refusal to execute such a waiver would result in the imposition of the sanctions mandated by Section 22 of the New York Election Law.

It is probably the case that in light of this Court's decision in Garrity v. New Jersey, supra, any waiver so executed would be invalid and any answers that were extracted under these circumstances would be inadmissible in a subsequent criminal prosecution. Nevertheless, there is no evidence in the record below that the New York State prosecutor was prepared to accept the efficacy and applicability of this Court's decision in Garrity. As Mr. Justice White pointed out in describing the Gardner case

"Although under Garrity any

> waiver executed may have been invalid and any answers elicited inadmissible in evidence, the State [of New York] did not purport to recognize as much and instead attempted to coerce a waiver on the penalty of loss of employment."
> Lefkowitz v. Turley, supra at 80-81.

Thus, in the case at bar, New York is apparantly behaving in precisely the same way that it behaved in Gardner v. Broderick, supra, and in Lefkowitz v. Turley, supra. New York continues to demand that certain persons called before the Grand Jury must execute a waiver of immunity. New York continues to deny the efficacy of Garrity's exclusionary rule. And in this case New York continues to coerce a waiver by threatening appellee with the loss of party office and future public employment.

In Malloy v. Hogan 378 U.S. 1, 8 (1964) this Court had defined the privilege against self-incrimination as

> "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty...for such silence."

And "penalty", Mr. Justice Douglas said subsequently in Spevak , supra at 515, "is not restricted to fine or imprisonment. It means... the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly'." Thus, in Garrity, supra at 497, this Court found that

> "[t]he option to lose their means of livelihood or pay the

> penalty of self-incrimination is the anti-thesis of free choice. That practice, like the interrogation practices we reviewed in Miranda v. Arizona [citations omitted] is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.'"

Garrity involved the threatened removal of certain public employees from positions as police officer and chief of police. This Court found the sanctions of employment disqualification to be impermissibly coercive. In Spevak v. Klein, supra, this Court found that the sanction of disbarment was similarly coercive not merely because it involved the loss of one's livelihood but because it involved as well the loss of one's good name and reputation within the community. Writing for the Court in Spevak, Mr. Justice Douglas asserted supra at 517,

> "that the Self-Incrimination Clause...should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."

In Gardner v. Broderick, supra, and in Sanitation Men v. Commissioner, supra, this Court again found the threatened discharge from public employment to be unconstitutionally coercive. And in Lefkowitz v. Turley this Court concluded that the loss of potential government contracts could not be imposed as sanctions to exact the waiver of one's privilege against self-incrimination.

The case at bar falls squarely within the precedential parameters of the Garrity-Turley line of authority. The disqualification that is imposed by Section 22 of the New York Election Law does not only involve a forfeiture of party office. In addition, Section 22 quite explicitly would disqualify appellee from holding any public office for the next five years. It thus poses a potential economic sanction which is clearly as severe as that in issue in Lefkowitz v. Turley, supra.

Appellant attempts to minimize this potential economic loss by advancing two arguments. First, appellant contends that since Mr. Cunningham "enjoys no property right to [future] office which is cognizable under the Constitution" the economic penalty is insubstantial. (Appellant's Brief p. 13). In response to this argument it must be noted that the architects that were before this Court in the Turley case enjoyed no property right to future government contracts. Nevertheless, this Court found that their disqualification from future government contracts imposed an economic sanction that was unconstitutionally coercive. Moreover, it is not clear whether the public employees who were threatened with job forfeiture in Garrity, Sanitation Men and Gardner were tenured employees with constitutionally cognizable property interests in their employment or whether they were probationary employees with no such property interest. That factual question is unclear simply because those cases did not turn upon whether the employees did or did not have property interests in their jobs. Rather those cases focused upon the coercive impact of compelling the waiver of the right to remain silent with the threat of disqualification from present and future employment. That same analytical focus should obtain here.

Appellant also attempts to minimize the instant economic penalty by contending that

Mr. Cunningham could "obtain equivalent remuneration elsewhere if he were in fact deprived of a salaried position." (Appellant's Brief p. 14). This contention is again quite similar to the argument advanced by appellant in the Turley case and rejected by this Court. In Turley, supra at 84, Mr. Justice White observed that "[a] significant infringement of constitutional rights cannot be justified by the speculative ability of those affected tocover the damages."

It is thus plain that Section 22, to the extent that it forecloses present and future public employment imposes an unconstitutional economic sanction for the exercise of one's Fifth Amendment privilege. But as this Court also suggested in Spevak, supra at , economic sanctions are not the only sort of penalty which will be found to coercively disable an individual from making a free and rational choice regarding the right to remain silent. As noted above, and as the district court below observed, "the threat of loss of professional standing and of reputation are powerful forms of compulsion" 9/ -- even though such sanctions are non-pecuniary in nature. In the context of the present case appellee is threatened with removal from his position as "the top leader of the Democratic Party in New York State." (New York Democratic Party Rules, Art IV, Sec. 1(b)(ii)). The loss of that position necessarily involves the loss of stature and public reputation. It is a loss that must impact coercively upon the free and unfettered decision as to whether to forego the privilege against self-incrimination.

9/Jurisdictional Statement p.14a.

Finally, but perhaps most significantly, Section 22 exacts the loss of party office as the price for the exercise of one's privilege against self-incrimination. As noted supra, Points I and II, participation in the affairs of a political party and holding party office are activities that are protected by the associational freedoms implicit in the the First Amendment. Thus New York is conditioning the exercise of one constitutional right upon the waiver of another. Accordingly, there is a coercive quality to New York's conduct in the present case that did not exist in any of the previously discussed cases. New York is not merely giving Mr. Cunningham the option between employment and the exercise of his Fifth Amendment rights. New York is giving him the option between exercising his Fifth and his First Amendment rights. Conditioning the exercise of Fifth Amendment rights upon the waiver of freedoms secured by the First Amendment must necessarily be found to be impermissibly coercive.

B. The State Cannot Compel Testimony That Has Not Been Immunized From Use In a Subsequent Criminal Prosecution

Amici do not contend that persons acting in a public or even quasi-public capacity may not be compelled to respond to questions about their performance of public duties. Indeed such persons can be questioned and removed from office for failing to properly account for their performance. But such persons cannot be questioned about matters that will expose them to criminal sanctions unless such individuals are afforded formal assurance that their answers will not be used in subsequent criminal prosecutions. See Lefkowitz v. Turley, supra at 283. See also Mr. Justice White's

concurrence in Maness v. Meyers, 419 U.S. 449, 475-476 (1975). 10/ And such persons cannot be removed from office for refusal to relinquish constitutional rights. Gardner v. Broderick, supra; Sanitationmen v. Commissioner, supra; See also Keyishian v. Board of Regents, 385 U.S. 589 (1967). 11/

10/ Mr. Justice White's concurring opinion in Maness v. Meyers, 419 U.S. 449, 475-476 (1975) emphasizes the importance of formal immunity protections. The opinion points out that, "If the state makes sufficiently clear that it recognizes this established rule [of 'testimonial' immunity] the attorney would have no business advising his client to disobey the court's order to answer. But the possiblity, much less the reality, of a compelled answer, along with its fruits, being immunized from later use was hardly brought home to this petitioner or his client...." In this case, as well, the possibility of testimonial immunity was not brought home to appellee.

11/ In the case at bar, the interest of the state in "safeguarding against corruption and the appearance of corruption in the political system" (Brief for Appellant at p.6) is no different from the interests asserted in Garrity and Gardner, to wit, safeguarding against corruption and the appearance of corruption among law enforcement officials. Moreover, the high political office that appellee Cunningham holds is not much different from the high governmental office that Mr. Garrity maintained as the police chief of a New Jersey borough. Accordingly, the State of New York is no more

In the instant case, the state prosecutor provided no formal assurance to appellee that his testimony would not be used in a subsequent criminal prosecution. On the contrary, the prosecutor demanded a complete waiver of immunity. The New York prosecutor again sought to do what the Garrity-Turley line of authority forbids. New York sought to compel testimony that has not been immunized. See particularly, Lefkowitz v. Turley, supra at 82. And then New York compounded its error by seeking to automatically disqualify appellee from public office, not for failure to answer questions about his official duties, but for refusal to waive a constitutional right. This New York cannot do. In Gardner v. Broderick, supra at 278, Mr. Justice Fortas specifically addressed this issue. He pointed out that Gardner

> "was discharged from office, not for failure to answer relevant questions about his official duties but for refusal to waive a constitutional right. He was dismissed for failure to relinguish the protection of the privilege against self-incrimination.... New York City discharged him for refusal to execute a document purporting to waive his constitutional rights and to permit prosecution of himself on the basis of his compelled testimony. [Gardner] could not have assumed - and certainly he was not required to assume - that he was being asked to do an idle act of no legal effect....It is clear that [Gardner's] testimony was demanded before the Grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust. If the latter had been the only purpose, there would have been no reason to compel [Gardner] to waive his immunity."

New York continues to repeat its unconstitutional conduct.

If New York had formally assured Mr. Cunningham that he would have testimonial immunity in subsequent criminal prosecutions, it could have, consistent with the constitution, questioned appellee regarding his public functions. And if, upon questioning appellee about his public functions, New York concluded that appellee was not properly executing those functions New York was then at liberty to take appropriate remedial steps. 12/

(footnote 11 cont'd.) justified in removing appellee from office for invoking his privilege against self-incrimination than the State of New Jersey would have been in removing Police Chief Garrity.

12/ As Amici suggest in Point II of this brief, the vast bulk of appellees responsibilities with the New York State Democratic Party extend to exclusively internal concerns of the party. In this regard appellee is engaged in private associational activity

But New York never formally granted appellee testimonial immunity and, instead, continued to utilize procedures that have been consistently invalidated by this Court. New York's conduct must again be condemned and invalidated.

(footnote 12 cont'd.) and is responsible to the members of the Democratic Party for the proper execution of that activity. The State of New York is barred by the First Amendment from intruding into the internal management of the Democrat's political association. New York can, however, appropriately regulate those aspects of appellees responsibilities that inextricably involve him in the nominating process, only so long as the regulating statute is not overly broad. See footnote 4, supra.

IV. APPELLEE'S REFUSAL TO WAIVE HIS FIFTH AMENDMENT RIGHTS CANNOT JUSTIFY EVEN AN INFERENCE OF WRONGDOING

Twenty years ago, both Justice Frankfurter 13/ and Dean Griswold 14/ reminded us that the Fifth Amendment is more than a loophole for the guilty. Rather, it stands as a bulwark for the innocent, protecting individuals against the potentially overwhelming power of an overzealous or irresponsible prosecutor. Accordingly, this Court has repeatedly recognized that a refusal to waive the Fifth Amendment's protection may be fully consistent with innocence. Grunewald v. United States, 353 U.S. 391 (1957). See also, Griffin v. California, 380 U.S. 609 (1965); Doyle v. Ohio, ___ U.S. ___ (1976).

Unfortunately, despite the efforts of Mr. Justice Frankfurter and Dean Griswold and despite a virtually unbroken line of decisions of this Court, the fallacy persists that a refusal to waive Fifth Amendment rights justifies an inference of quilt. In this case, New York has compounded that unfortunate

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13/ "This command of the Fifth Amendment... registers an important advance in the development of our liberty - 'one of the great landmarks in man's struggle to make himself civilized.'...Too many, even those who should be better advised, view the privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either quilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the partriots who sponsored the Bill of Rights...." Ullman v. United States , 350 U.S. 422, 426-427 (1956).

14/ See Also Griswold, The Fifth Amendment Today, pp. 9-22.

fallacy by treating appellee's refusal to waive his Fifth Amendment rights, not merely as a permissible inference of wrongdoing, but as a final admission of guilt justifying his peremptory removal from office. Even if some inference of wrongdoing might properly be drawn. under certain circumstances, from a claim of Fifth Amendment privilege, surely such a weak and ambiguous inference cannot justify, without more, the imposition of sanctions predicated on guilt. Baxter v. Palmigiano, ___ U.S. ___, 47 L.Ed 2d 810, 821 (1976). Moreover, under the circumstances of this case, no inference whatever may be drawn from appellee's refusal to waive his Fifth Amendment rights. As we have seen, one of the prime functions of the Fifth Amendment is to provide an innocent individual with some protection against an overbearing prosecutor. The plight of the Special Prosecutor in this case, whose reputation, and, indeed, survival in office, depended upon implicating appellee in criminal action would have rendered it pure folly for appellee to have abandoned his Fifth Amendment rights. 15/ Indeed, it is doubtful whether St. Francis of Assisi would have waived his rights under similar circumstances. Thus, under the facts of this case, no inference of wrongdoing, (no matter how slight) may rationally be drawn from appellee's simple act of self-

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15/ The Special Prosecutor, against whom appellee invoked his Fifth Amendment rights, had been continued in office for six additional months for the avowed purpose of completing his investigation of appellee.

preservation. Accordingly, even under the arguably relaxed standards of Baxter v. Palmigiano, supra, 16/ appellee's refusal to waive his Fifth Amendment rights cannot trigger the collateral disability imposed by Section 22 of New York's Election Law.

16/ Amici regret this Court's decision in Baxter v. Palmigiano, supra, which appears to permit a claim of Fifth Amendment privilege to give rise, under appropriate circumstances, to a weak permissive inference of wrongdoing. Baxter, limited as it is, constitutes an unfortunate regression to a 'hostile' and 'niggardly' view of the Fifth Amendment. However, since New York has attempted to draw, not a weak permissible inference, but a virtual irrebutable presumption of guilt, and since the factual circumstances surrounding the claim of privilege by appellee do not justify any inference of wrongdoing whatever, Section 22 cannot be sustained, even under Baxter v. Palmigiano.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be affirmed.

Respectfully submitted,

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